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IN THE

Supreme Court of the United States

MAR 5 1973

October Term, 1972.

No. 72-1204

PEARSON CANDY CO., a division of W. R. GRACE & Co.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

To the United States Court of Appeals
for the Ninth Circuit.

PETITION FOR A WRIT OF CERTIORARI.

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NATIONAL LABOR RELATIONS BOARD,
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To the United States Court of Appeals for the Ninth Circuit.

PETITION FOR A WRIT OF CERTIORARI.

The Petitioner, Pearson Candy Co., a Division of W. R. Grace & Co. ("Pearson"), respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on December 6, 1972.

OPINIONS BELOW.

The opinion of the Court of Appeals has not yet been officially reported and appears at Appendix A, *infra*, pp. 1-2. The Decision and Order of the National Labor Relations Board ("Board") are reported at 187 N.L.R.B. No. 62, and appear at Appendix B, *infra*, pp. 3-16.

JURISDICTION.

The judgment of the Court of Appeals was entered on December 6, 1972. This Petition for a Writ of Certiorari was filed within 90 days of said date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED.

1. Is the Board's discretion under Section 9 of the National Labor Relations Act so broad as to permit the application of inconsistent standards to employers' and unions' pre-election campaign propaganda?

2. In a case in which a labor organization's certification is being challenged, is enforcement of a Board bargaining order appropriate where the Board has: (1) denied the employer's requests for evidentiary hearings at all stages of the underlying representation proceedings; (2) issued a notice to show cause in a subsequent certification amendment proceeding; (3) overruled factual contentions of the employer whose request for an evidentiary hearing in said certification amendment proceeding it had denied; and (4) conducted summary unfair labor practice proceedings during which it unilaterally cancelled a scheduled evidentiary hearing?

STATUTE INVOLVED.

This case involves Sections 7, 8 and 9 of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. §151, *et seq.* ("Act") the pertinent parts of which appear at Appendix D, *infra*, pp. 19-22.

STATEMENT OF THE CASE.

1. Proceedings Before the National Labor Relations Board.

A. Case No. 31-RC-956.

Pursuant to a representation petition filed by Bakery & Confectionery Workers International Union of America, Local 400, International Brotherhood of Teamsters ("I.B.T. Local 400") in October, 1968, the Director of the Board's 31st Region ("Director") conducted a representation election ("first election") among Pearson's production and maintenance employees in December, 1968, in which a majority of Pearson's employees voted against representation by any labor organization. I.B.T. Local 400 objected to the results of the election on the basis of a handbill ("Pearson leaflet") which Pearson distributed to its employees prior to the election. It stated:

> "VOTE NO—AGAINST THE UNION IF YOU DON'T WANT:
>
> 1. To pay your own money to join a union
> 2. To pay union dues out of your check
> 3. Only one raise each year
> 4. To go to union meetings at night on your own time
> 5. To pay a fine if you don't go to meetings
> 6. To pay a fine if you don't pay your dues
> 7. To be discharges [sic] if you don't join the union
> 8. To lose money by going on strike when the union orders you to go
> 9. To walk a picket line when ordered by the union

10. To be told to take your problems (personal or business) to a union steward and not be able to talk to your supervisor or the company manager
11. To be forced to tell on your friends and fellow workers whenever they break a union rule (the union constitution says you must be a tattle-tale or you can be required to pay a fine)
12. To pay extra money to the union when it decides it hasn't enough money to pay its officers
13. To be held back from getting more money because of union rules
14. Impersonal working conditions
15. Your basic freedom of opportunity restricted

"DON'T LET THESE THINGS HAPPEN TO YOU—VOTE NO." (Emphasis in the original).

Following an *ex parte* investigation of some four months' duration, the Director, in April, 1969, issued a "Report on Objections and Direction of Second Election" ("Director's First Report") which set aside the first election on the stated rationale that the "assertions" in the Pearson leaflet bore untrue "connotation[s]" that the conditions enumerated in the leaflet would become obligatory upon Pearson's employees if they voted for I.B.T. Local 400.

The Director's First Report made no reference to any of the following: an election eve speech by Pearson's president which stated that I.B.T. Local 400 "customarily" required dues payments as a condition of em-

ployment; the Board's official Notice of Election which apprised Pearson's employees of their statutory right under the Act to "form, join, or assist labor organizations" or to "refrain from any or all such activities"; or the first article of the then current I.B.T. Local 400 "Candy Agreement" which provided:

> "It shall be a condition of employment that all employees of the Employer covered by this Agreement who are members of the Union in good standing on the effective date of this Agreement shall remain members in good standing, and those who are not members on the effective date of this Agreement shall, on or after the thirty-first calendar day following the effective date of this Agreement, become and remain members in good standing in the Union. Good standing shall mean not in arrears on initiation fees and/or dues."

In May, 1969, the Board notified Pearson that it would "not consider" its Request for Review of the Director's First Report on the ground that the first election had been conducted pursuant to a consent election agreement.

I.B.T. Local 400 received a majority of the votes cast in the second election, which the Director conducted in August, 1969. Pearson timely objected to its results on the basis of a handbill received by its employees ("I.B.T. Local 400 Handbill") on the day of the second election which stated in part:

> "Immediately following certification of the election, all Pearson employees will be called into a membership meeting. At this meeting you, as a group, will draw up contract proposals. Following that, negotiations to establish a contract will get under way.

"LOCAL 400 has negotiated for its members:

Dental Plan	Highest wages in the Candy Industry
Hospitalization including Major Medical up to $10,000	Night Compensation pay
Pension Plan	Sick Leave benefits
Prescription Drug Plan	Guaranteed seniority for job protection at its best

"SECURE THESE BENEFITS BY JOINING LOCAL 400." (Emphasis in the original).

In September, 1969, following a second *ex parte* investigation, the Director issued a "Supplemental Report and Certification" ("Director's Second Report"), which concluded, *inter alia,* that I.B.T. Local 400 had negotiated each of the items referred to in its handbill; that a reading of the handbill failed to reveal any misrepresentation concerning the nature or significance of the election or the availability of benefits as an automatic consequence of the election; and that to the extent that the handbill was couched in terms which forecast an election victory for I.B.T. Local 400, such language was mere campaign "puffery" of a type which the Board would not seek to police or censor.

The Director's Second Report left unanswered Pearson's contention that the handbill had misrepresented the consequences of membership in I.B.T. Local 400. Nor did it refer to the other primary ground for Pearson's objections, namely that the handbill's claim that I.B.T. Local 400 had negotiated the highest wages in the candy industry was false.

On October 3, 1969, Pearson filed with the Board a Request for Review of the Director's Second Report. The Director elected to characterize it as a "motion for reconsideration" which was then processed by the Regional Office in another *ex parte* investigation.

On October 24, 1969, during the course of this third *ex parte* investigation, Pearson formally requested that the Director order an evidentiary hearing with respect to the factual issues raised by its still pending objections. On November 5, 1969, the Director issued a "Ruling on Motion for Reconsideration" ("Director's Third Report") which confirmed I.B.T. Local 400's certification as the bargaining representative of Pearson's employees and denied Pearson's still pending request for a hearing.

Acknowledging evidence that at least 25% of Pearson's employees in comparable classifications "possibly" received higher wages than any which had been negotiated by I.B.T. Local 400, the Director concluded that the latter's claim to have negotiated the highest wages in the candy industry was a permissible "generalized boast" and an "imprecise expression" of a type not uncommon in campaign literature.

The Third Report overruled Pearson's contention that the I.B.T. Local 400 handbill misrepresented that the benefits to which it referred were an automatic consequence of membership on the ground that "[n]owhere does . . . [the] leaflet make such a statement." The Third Report further concluded that a Board leaflet which I.B.T. Local 400 mailed to Pearson's employees a week before the election would have provided them with "enlightenment and clarification" on this subject.

B. Case No. 31-AC-18.

On April 27, 1970, Bakery & Confectionery Workers International Union of America, Local 400, AFL-CIO ("Union") filed a Petition with the Director requesting that it be substituted for I.B.T. Local 400 as the bargaining representative named in the certification which had been issued pursuant to the Director's Second Report and confirmed by his Third Report.

On June 5, 1970, following yet another *ex parte* investigation of the alleged basis for the certification amendment, the Director served on Pearson a "Notice to Show Cause" why the Petition should not be granted which contained, *inter alia*, factual findings as to the constitution, by-laws, structure, functions, and bargaining authority of the Union.

On June 11, 1970, Pearson filed a timely Response to the Notice to Show Cause disputing said findings and requesting that the Director either order a hearing on the factual issues raised by its Response or authorize it to depose a responsible official of the Union.

On June 30, 1970, the Director issued a "Decision and Order Amending Certification" (Director's Fourth Report") which granted the Union's Petition and denied Pearson's request for a hearing or depositions.

On July 31, 1970, the Board notified Pearson that the Appeal which it had filed with respect to the Director's Fourth Report would not be considered.

C. Case No. 31-CA-1966.

On July 31, 1970, pursuant to a charge filed by the Union, the Director issued a "Complaint and Notice of Hearing", which alleged that Pearson had violated Section 8(a)(1) and (5) of the Act by refusing

to bargain with the Union and set a hearing on the charges for October 6, 1970.

Pearson filed a timely Answer alleging, *inter alia*, that the amended certification which had been granted to the Union as the result of the above-described proceedings in Case No. 31-RC-956 and Case No. 31-AC-18 was issued in contravention of Board policy and could not form the basis of a bargaining obligation. On August 18, 1970, the Director filed a Motion for Summary Judgment seeking the issuance of a remedial order "without the taking of oral testimony."

On September 17, 1970, the Board revoked the *subpoenas duces tecum* which Pearson had served on the Union with reference to the October 6th hearing. On September 21, 1970, the Board issued an "Order Transferring Proceeding to the Board and Notice to Show Cause", which postponed indefinitely the October 6th hearing and required Pearson to show cause before October 5, 1970 why the Director's Motion for Summary Judgment should not be granted. On December 24, 1970, following the filing of Pearson's timely Response, the Board issued its Decision and Order which appears at Appendix B, *infra*, pp. 3-16.

Pearson's subsequent Motion for Reconsideration was denied on March 18, 1971. The Board's "Order Denying Motion" appears at Appendix C, *infra*, pp. 17-18.

2. Decision of the Court of Appeals.

The decision below concludes that the Director's rulings were supported by the "kind of evaluation of relevant facts for which his office was created," but neither analyzes the evidence the Director acted upon nor

evaluates the decisional criteria which he applied to the parties' pre-election propaganda. Instead, it sanctions the Director's "puffery" and "imprecise expression" rationalizations even though they reflect the kind of administrative laxity which has been specifically disapproved by the Courts of Appeals for the Fifth and Tenth Circuits. *N.L.R.B. v. Producers Cooperative Association,* 457 F.2d 1121, 1126 (10th Cir. 1972); *N.L.R.B. v. Southern Foods, Inc.,* 434 F.2d 717, 720 (5th Cir. 1970).

The decision below also appears to assume that Pearson conceded that its leaflet justified the Director's decision to set aside the first election:

> "The company contended that the propaganda efforts of the union in the second election were at least as misleading as the company's campaign literature which caused the first election to abort." Appendix A, *infra,* at p. 2.

Pearson has made no such concession, but did argue in its brief to the Court below that even the most perfunctory effort to apply uniform standards of conduct to the parties' pre-election propaganda in Case No. 31-RC-956 would have required that either both parties' objections be overruled or that both be sustained.

Finally, the decision below makes no reference to, or attempt at accommodation with, either *N.L.R.B. v. Gebhardt-Vogel Tanning Co.,* 389 F.2d 71 (7th Cir. 1968), which holds that the order to show cause technique is an inappropriate vehicle for manipulating a labor organization's certification, or *American Bridge Division, U.S. Steel Corp. v. N.L.R.B.,* 457 F.2d 660 (3rd Cir. 1972), which spells out standards for certification amendment procedures, although both were brought to the Court's attention.

REASONS FOR GRANTING THE WRIT.

Pearson's objections to the I.B.T. Local 400 handbill presented the Director with two critical issues: (1) was the handbill's claim that I.B.T. Local 400 had negotiated the highest wages in the candy industry a material misrepresentation; and (2) did it misrepresent that the benefits which it enumerated were an automatic consequence of membership in I.B.T. Local 400.

Although it denied Pearson's request for a hearing in Case No. 31-RC-956 on the ground that there were no disputed factual issues which might affect its findings, the Director's Third Report concedes that 25% of Pearson's employees working in classifications comparable to those covered by I.B.T. Local 400 contracts might have been paid more than the rates provided for in said contracts. Moreover, it is undisputed that Pearson did not have a reasonable opportunity to investigate and respond to the claims in the I.B.T. Local 400 handbill. Accordingly, the holding below that the Board exercised proper discretion in overruling Pearsons's objection to I.B.T. Local 400's wage claims conflicts directly with the decisions of at least three other Courts of Appeals and those of the Court of Appeals for the Ninth Circuit itself.

The Court of Appeals for the First Circuit in two recent decisions, *N.L.R.B. v. Millard Metal Service Center, Inc.*, ... F.2d ...., 82 L.R.R.M. 2345 (1st Cir. 1973), and *Cross Baking Co. v. N.L.R.B.*, 453 F.2d 1346 (1st Cir. 1971), rehearing denied, 453 F.2d 1351 (1st Cir. 1971), has confirmed that wage rates are of "particular sensitivity" to employees, and that unions' representations on this subject which are made at a time so as to preclude investigation and response

will be held to the closest scrutiny—a standard not met in the Board's proceedings or the decision below.

Indeed, neither the decision of the Board nor that below meets the criteria established by the First Circuit for determining whether the Director acted arbitrarily in overruling Pearson's objections and issuing an amended certification to the Union. In *N.L.R.B. v. Lowell Corrugated Container Corp.*, 431 F.2d 1196 (1st Cir. 1970), the Court stated:

> "We do not agree that the Board reviewed the rejected matter. Nor do we agree that there is no general duty to do so. Somewhere, sometime, someone must review the basis of the Regional Director's decision to ascertain whether in fact it was arbitrary, or in violation of Board policy or the Act. If the Board is here claiming that it, rather than the trial examiner, does so, we must find that its *pro forma* decision affirming the examiner's findings and rulings neither recognizes such a duty, nor indicates its performance." 431 F.2d at 1197.

The Court of Appeals for the Fifth Circuit has ruled repeatedly that the "generalized boast" and "puffing" rationalizations which were employed by the Director and approved below may not be used to condone last minute material misrepresentations which preclude effective reply. *S. H. Kress Co. v. N.L.R.B.*, 430 F.2d 1234 (5th Cir. 1970); *N.L.R.B. v. Bill's Institutional Commissary Corp.*, 418 F.2d 405 (5th Cir. 1969); *National Cash Register Co., v. N.L.R.B.*, 415 F.2d

1012 (5th Cir. 1969); and *N.L.R.B. v. Southern Foods Inc., supra.* In the latter case the Court commented:

> "Apparently 'puffing' is a new term in the Board's lexicon; its usage has been more common in used car lots than in Board-supervised elections." 434 F.2d at 720.

Moreover, the Fifth Circuit has confirmed that where, as here, an employer's objections raise "substantial and material factual issues", the requirements of due process can be satisfied only by the granting of an evidentiary hearing at some stage prior to the enforcement of a Board order. *Luminator Division of Gulton Industries, Inc. v. N.L.R.B.*, ... F.2d ...., 81 L.R.R.M. 2885 (5th Cir. 1972); *N.L.R.B. v. Gooch Packing Co.*, 457 F.2d 361 (5th Cir. 1972); *N.L.R.B. v. Smith Industries, Inc.*, 403 F.2d 889 (5th Cir. 1968). See also *N.L.R.B. v. Bata Shoe Company*, 377 F.2d 821 (4th Cir. 1967). The refusal of the Court below to recognize this principle is another compelling reason for review.

In *N.L.R.B. v. Producers Cooperative Association, supra,* the petitioning union made election eve misrepresentations about wage increases which it allegedly had obtained for the employees of another employer. After an *ex parte* investigation, such as the Director conducted here, the Board overruled the employer's objections to the election, finding that the union merely had engaged in puffing. The Board adopted the same rationale in subsequent summary unfair labor practice proceedings against the employer. Denying enforcement of the Board's bargaining order, the Court of Appeals for the Tenth Circuit observed:

> "Purportedly authoritative and truthful assertions concerning wages . . . are not mere prattle or puffery; . . . they are the stuff of life for unions and members, . . ." 457 F.2d 1125.

The permissiveness with respect to last minute wage misrepresentations which is sanctioned below is also totally inconsistent with the rigorous standards of permissible campaign conduct which have been established by the Court of Appeals for the Ninth Circuit itself. See *N.L.R.B. v. Winchell Processing Corp.*, 451 F.2d 306 (9th Cir. 1971); and *N.L.R.B. v. G. K. Turner Associates*, 457 F.2d 484 (9th Cir. 1972).

Another strong reason for review is that Courts of Appeals do not, as did the decision below, enforce bargaining orders supported by administrative discretion so broad and arbitrary as to permit the inconsistent treatment of parties' campaign propaganda.

The leaflet which Pearson's employees received on the day of the second election enumerated a series of benefits which I.B.T. Local 400 allegedly had negotiated and then concluded: "SECURE THESE BENEFITS BY JOINING LOCAL 400." The Director's Third Report overruled Pearson's contention that this statement misrepresented the consequences of membership in Local 400, concluding that "to the extent that employees might have construed" . . . the [leaflet] "in the ways suggested by [Pearson], they could have gained enlightenment and clarification" by reading a Board leaflet which I.B.T. Local 400 mailed to Pearson's employees approximately a week before the second election.

Under this rationale, the Board's Notice of Election advising employees of their right to join or refrain from joining any labor organization, which Pearson posted prior to the first election, should have disposed of the very issue upon which the Director set that election aside: Pearson's alleged misrepresentations as to the

consequences of a union victory. However, there is no reference to the potentially cleansing effects of said Notice of Election in any of the Board's documentation or the decision below although it would seem that Board literature should have an equally salutary effect on all parties' propaganda, and that employees' analytical prowess should not vary with the authorship of the handbills to which they are subjected. The Director's conclusion as to the effect of the Board leaflet is particularly unsupportable as there is no evidence in the record as to which, if any, of Pearson's employees received, read or compared the Board's leaflet with the I.B.T. Local 400 handbill, a defect ignored by the decision below.

Nor is there any comment in the decision below with respect to the minute dissection to which Pearson's handbill was subjected on the one hand and the "puffery" and "imprecise expression" rationalizations which the Director adopted in condoning the I.B.T. Local 400 claims on the other.

In *N.L.R.B. v. Sanitary Laundry, Inc.*, 441 F.2d 1368 (10th Cir. 1971), the Board, as here, sustained a union's objections to the first election and overruled the employer's subsequent objections to the rerun election in which the union prevailed. Refusing to enforce the Board's bargaining order, the Court first reviewed in detail the employer's handbill, which the Board used as a basis for setting aside the first election. It stated in pertinent part:

> "IF you don't want DUES, FINES and ASSESSMENTS . . . VOTE NO
>
> "IF you don't want CONSTANT PAYCHECK UNCERTAINTY . . . VOTE NO

"IF you don't want to pay for what you ALREADY HAVE . . . VOTE NO

"IF you want to continue STEADY WORK WITHOUT STRIKES . . . VOTE NO . . .
441 F.2d at 1370.

The Court concluded:

". . . the Board was not justified in setting aside the first election, but in reaching that conclusion we do not limit our review to a consideration of the incidents of the first election viewed in isolation . . . we cannot attribute to the Board a discretion so flexible as to justify its first action when laid side by side with its subsequent determination . . . in the second election. . . .

"The Board's discretion, though indeed broad, must be exercised with consistency in order to further the purposes of the Act." 441 F.2d at 1371.

In *Wilkinson Manufacturing Co. v. N.L.R.B.*, 456 F.2d 298 (8th Cir. 1972), the Court confirmed that inconsistent treatment of parties' election tactics is abusive of the Board's discretion and fatal to bargaining order enforcement.

Of equal reason for granting review of the decision below is its approval of the Board's certification amendment procedures in Case No. 31-AC-18. By sanctioning the Board's use of the Notice to Show Cause device as a vehicle for transferring bargaining rights from I.B.T. Local 400 to the Union in the face of Pearson's conflicting factual contentions while refusing its request for a hearing or depositions, the decision below comes

into direct conflict with *N.L.R.B. v. Gebhardt-Vogel Tanning Co., supra,* in which the Court stated:

> ". . . we do not think the Board can nullify an employer's right to a hearing on a crucial factual issue by resort to a show cause order. This appears to be a novel procedure; at any rate, no case is cited where it has been approved. If the Board can properly utilize it in the instant situation, we discern no reason why it cannot do so in every unfair labor practice charge by calling upon the employer to admit the allegations of the charge or take the risk of having them accepted as a verity." 389 F.2d at 75.

The Notice of Show Cause which the Director served on Pearson alleged, *inter alia,* that there had been no change at any time pertinent in the structure, function, or general membership of the Union, and that the officers, constitution, by-laws, and bargaining authority of the Union remained unaffected by its changes in affiliation. In its Response, Pearson contended that the Union had become part of, subordinate to, controlled by, and monetarily obligated to a merged international union which was substantially and significantly different in structure, membership, leadership, obligations, regulations, policies, and practices. Pearson further alleged that its employees had had no opportunity to vote on any of the mergers, affiliations, or disaffiliations in which I.B.T. Local 400 and the Union had been engaged, circumstances which precluded the Board's use of the certification amendment procedure. *American Bridge Division, U.S. Steel Corp. v. N.L.R.B., supra.*

The Director nevertheless proceeded to ignore Pearson's factual allegations, deny its request for a hearing, and issue the amended certification. By approving of this obvious denial of administrative due process, the decision below not only collides with *Gebhardt-Vogel,* but ignores the principle which the Court itself recognized in *G. K. Turner,* that the Board may not resolve a factual dispute against a party on the one hand, and deny it a hearing on the other. As the Ninth Circuit observed in *G. K. Turner:*

> "Since the Board refused to hold an evidentiary hearing at which credibility issues and factual conflicts could be resolved, . . . we are bound on this record to accept as true all of the company's versions of the conversations." 457 F.2d at 487.

Conclusion.

Pearson respectfully submits that the decision below should not be allowed to stand as it clothes the Board with a breadth of administrative discretion which has no statutory basis and exceeds the parameters established by those courts primarily responsible for reviewing the Board's decisions.

Review should also be granted because the standards of campaign conduct and administrative processing sanctioned below clearly conflict with those enforced by the Courts of Appeals for the First, Fifth, Eighth, and Tenth Circuits, as well as the Ninth Circuit itself.

Moreover, the Ninth Circuit's approval of the Board's use of a notice to show cause in lieu of an evidentiary

hearing in a proceeding involving a factual dispute collides directly with the Seventh Circuit's disapproval of this technique in *Gebhardt-Vogel,* and constitutes an unprecedented departure in the area of administrative due process.

For the reasons stated herein, this Court is respectfully urged to grant this Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX A.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

National Labor Relations Board, Petitioner vs. Pearson Candy Co., A Division of W. R. Grace & Co., Respondent. No. 71-2156.

[December 6, 1972].

On Application for Enforcement of an Order of the National Labor Relations Board

Before: KOELSCH and GOODWIN, Circuit Judges and PLUMMER, District Judge.*

GOODWIN, Circuit Judge:

The National Labor Relations Board petitions for enforcement of its order pursuant to Section 10(e) of the National Labor Relations Act (29 U.S.C. § 160e). The petition is well taken.

Pearson Candy Company has refused to bargain with Local 400, Bakery and Confectionery Workers, in its Culver City, California plant. The company contends that the union was not properly certified as the bargaining agent for the employees.

The Regional Director ruled against the company on challenges to two consent elections. After the company won the first election, the local filed objections to the company's election propaganda which caused the Regional Director to order a second election. The local won the second election, and the company objected.

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*The Honorable Raymond E. Plummer, Chief Judge, United States District Court for the District of Alaska.

The company contended that the propaganda efforts of the union in the second election were at least as misleading as the company's campaign literature which caused the first election to abort. The Regional Director found otherwise.

The company contends that the Regional Director applied a double standard, holding the company to a higher degree of accuracy in its propaganda than he demanded of the local. This charge is not borne out by the record. The Regional Director's actions were neither arbitrary nor capricious, but were supported by the kind of evaluation of relevant facts for which his office was created. There is no reason to overturn the Regional Director's disposition of the various objections to the elections.

Finally, the company objects that the local is not entitled to certification because it substantially changed its character when it shifted its international affiliation during the period in controversy. During this period (1968-1969), there was some shifting of international affiliation among many locals in the bakery and confectionery industries. The shifting of affiliation arose out of events having nothing to do with this litigation. It is sufficient to note that the structure and character of the local, which is the only relevant inquiry in these cases, remained substantially unchanged, notwithstanding turbulence at higher levels of international union politics. These questions were fully explored by the Regional Director and resolved upon a record from which the company has called to our attention no relevant flaw.

The Petition for Enforcement is granted.

APPENDIX B.

Decision and Order.

United States of America, before the National Labor Relations Board.

Pearson Candy Co., a Division of W. R. Grace & Co. and Bakery & Confectionery Workers International Union of America, Local 400, AFL-CIO. Case 31—CA—1966.

Upon a charge filed on July 17, 1970, by Bakery & Confectionery Workers International Union of America, Local 400, AFL-CIO, herein called the Union, and duly served on Pearson Candy Co., A Division of W. R. Grace & Company, herein called the Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 31, issued a complaint on July 31, 1970, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing before a Trial Examiner were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on September 9, 1969, following a second Board election in Case 31—RC—956 the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[1] and that, com-

[1]Official notice is taken of the record in the representation proceeding. Case 31 — RC — 956 as the term "record" is defined in Secs. 102.68 and 102.69(f) of the Board's Rules and

(This footnote is continued on next page)

mencing on or about February 6, 1970, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On August 11, 1970, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint. The Respondent admits all of the factual allegations of the complaint, including its refusal to recognize and bargain with the Union, but contends that it is not obligated to bargain because the Union's certification is invalid by reason of the Regional Director's errors at the several stages of the underlying representation case.

On August 31, 1970, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment, supported by a brief, in which he contends that the Respondent's answer to the complaint raises no factual issues warranting a hearing, and prays the Board to grant the Motion for Summary Judgment. Subsequently, on September 21, 1970, the Board issued an Order transferring the proceeding to the Board and a Notice to Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to Notice to Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938, enfd. 388 F.2d 683 (C.A. 4, 1968); *Golden Age Beverage Co.*, 167 NLRB 151; *Intertype Co. v. Penello*, 269 F.Supp. 573 (D.C. Va., 1967); *Follett Corp.*, 164 NLRB 378, enfd. 397 F.2d 91 (C.A. 7, 1968); Sec. 9(d) of the NLRA.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its response the Respondent contends that the Regional Director's Report on Objections, dated April 30, 1969, was erroneous as he sustained the Union's objections to the first election conducted on December 10, 1968, and directed a second election. The Respondent also contends that the Regional Director erred in his Supplemental Report and Certification of Representative, dated September 9, 1969, in that he failed to sustain the Respondent's objections to the second election, failed to afford the Respondent an opportunity for a hearing on its objections, and certified the Union as the bargaining representative of the employees in the agreed-upon unit. Finally, the Respondent contends that the Regional Director erred in the Decision and Order amending Certification issued on June 30, 1970, by depriving the Respondent of the right to a hearing and granting the Union's petition to amend its certification to reflect its current affiliation with the AFL-CIO.

For the reasons noted below we find the Respondent's several contentions to be without merit. On December 10, 1968, pursuant to an Agreement for Consent Election executed by the parties and approved by the Regional Director, a secret ballot election was conducted in which the Union failed to receive a majority of the valid votes cast, and thereafter filed timely objections. After an investigation, the Regional Director found that written material distributed by the Respondent to its employees on the day of the election contained threats and material misrepresentations which necessitated setting aside the election, and he directed that a

second election be conducted. The Respondent filed with the Board a Request for Review, which the Board denied on May 14, 1969, on grounds that the election was conducted under the terms of an Agreement for Consent Election, and the Board would not entertain an appeal from the Regional Director's actions taken pursuant to the Consent Agreement.

A second election was conducted on August 7, 1969, and the tally of ballots reflects that of 47 valid votes cast, 31 were cast for the Union, 14 were cast against the Union, and there were 2 challenged ballots not determinative of the results of the election. The Respondents filed timely objections alleging that the election was delayed for 1 hour and 15 mintues by reason of the failure of the Board's agent to appear at the time scheduled, and that shortly before the election the Union distributed a handbill containing numerous material misrepresentations, which were capitalized upon by the Union during the delay in the opening of the polls. After an investigation conducted pursuant to Section 6 of the Agreement for Consent Election, the Regional Director issued a Supplemental Report in which he found that the Union's handbill did not contain material misrepresentations and that the delay in the conduct of the election had not deprived any employee of an opportunity to vote. Accordingly, the Regional Director overruled the objections and certified the Union as the bargaining representative of the employees in the agreed-upon unit. Thereafter, the Respondent again filed a Request for Review with the Board, which the Regional Director chose to treat as a motion for reconsideration. After having afforded the Respondent the Opportunity to provide additional evidence in support of its objections, the Regional Director denied the motion

for reconsideration and affirmed the findings and conclusions set forth in his Supplemental Report and Certification.

On April 27, 1970, subsequent to its certification, the Union filed a petition in Case 31—AC—18, requesting the Regional Director to amend the certification to reflect the change in its affiliation from the International Brotherhood of Teamsters to the AFL-CIO. On June 30, 1970, the Regional Director, after issuance of a Notice to Show Cause to which the Respondent replied, issued a Decision and Order amending certification. On July 9, 1970, the Respondent filed an appeal with the Board contending that the action of the Regional Director in amending the certification was arbitrary and capricious, and by telegram dated July 30, 1970, the Board denied the appeal.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a Respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[2]

All issues raised by the Respondent in the instant unfair labor practice case were raised and determined in the prior representation proceeding, and the Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any such special circumstances exist herein to require the Board to examine any of the decisions made in the representation proceeding. Moreover, the issues in the representation proceeding were

[2]See *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

determined by the Regional Director pursuant to the Agreement for Consent Election, and we find no merit to the Respondent's arguments that the Regional Director's actions were either arbitrary or capricious.[3] Accordingly, we find that the Respondent has not raised any issue properly litigable in this unfair labor practice proceeding. Accordingly, we shall grant the Motion for Summary Judgment.[4]

On the basis of the entire record, the Board makes the following:

Findings of Fact

I. The Business of the Respondent

The Respondent is engaged in the wholesale manufacture and distribution of candies and specialty items at its plant located in Culver City, California. The Respondent during the normal course and conduct of its business, annually sells and ships directly to customers located outside the State of California products valued in excess of $50,000, or annually purchases and receives goods and materials directly from suppliers located outside the State of California valued in excess of $50,000.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will

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[3] *Mitchiyoshi Uyeda, d/b/a Udaco Manufacturing Company,* 164 NLRB 700.

[4] In view of our finding that an evidentiary hearing is not required in this proceeding, and as we have granted the Motion for Summary Judgment, we shall also grant the Charging Party's motion to revoke the subpena served by the Respondent on the Regional Director for Region 31, which motion was transferred to the Board on August 25, 1970.

effectuate the policies of the Act to assert jurisdiction herein.

II. The Labor Organization Involved

Bakery & Confectionery Workers International Union of America, Local 400, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. Unfair Labor Practices

A. *The Representation Proceeding*

1. The unit

The following employees of the Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All candy manufacturing, stock, warehouse, wrapping and packing, and maintenance mechanic employees employed by the Employer at its plant located at 10101 Jefferson Boulevard, Culver City, California, excluding office clerical, salesmen, professional employees, guards and supervisors as defined in the Act.

2. The certification

On August 7, 1969, a majority of the employees of Respondent in said unit, in a secret ballot election conducted under the supervision of the Regional Director for Region 31 designated the Union as their representative for the purpose of collective bargaining with the Respondent. The Union was certified as the collective-bargaining representative of the employees in said unit on September 9, 1969, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about September 12, 1969, and at all times thereafter, the Union has requested the Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about January 17, 1970, and continuing at all times thereafter to date, the Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that the Respondent has, since January 17, 1970, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, has a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in and is engaging is unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request,

bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a sign [sic] agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785; *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229, enfd. 328 F.2d 600 (C.A. 5), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421, enfd. 350 F.2d 57 (C.A. 10).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

Conclusions of Law

1. Pearson Candy Co., A Division of W. R. Grace & Co., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Bakery & Confectionery Workers International Union of America, Local 400, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of the Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act.

> All candy manufacturing, stock, warehouse, wrapping and packing, and maintenance mechanic employees employed by the Employer at its plant

located at 10101 Jefferson Boulevard, Culver City, California, excluding office clerical, salesmen, professional employees, guards and supervisors as defined in the Act.

4. Since September 9, 1969, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about January 17, 1970, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent, Pearson Candy Co., A Division of W. R. Grace & Co., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment, with Bakery & Confectionery Workers International Union of America, Local 400, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All candy manufacturing, stock, warehouse, wrapping and packing, and maintenance mechanic employees employed by the Employer at its plant located at 10101 Jefferson Boulevard, Culver City, California, excluding office clerical, salesmen, professional employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Culver City, California, plant copies of the attached notice marked "Appendix."[5] Copies of

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[5]In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

said notice, on forms provided by the Regional Director for Region 31, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 31, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D.C. Dec. 24, 1970.

John H. Fanning, Member
Gerald A. Brown, Member
Howard Jenkins, Jr., Member
NATIONAL LABOR RELATIONS
BOARD

[SEAL]

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Bakery & Confectionery Workers International Union of America, Local 400, AFL-CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the abovenamed Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All candy manufacturing, stock, warehouse, wrapping and packing, and maintenance mechanic employees employed by the Employer at its plant located at 10101 Jefferson Boulevard, Culver City, California, excluding office clerical, salesmen, professional employees, guards and supervisors as defined in the Act.

PEARSON CANDY CO., A DIVISION OF W. R. GRACE & CO.
(Employer)

Dated ..... By .....
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Building, Room 12100, 11000 Wilshire Boulevard, Los Angeles, California 90024, Telephone 213—824—7351.

APPENDIX C.

Order Denying Motion.

United States of America, Before the National Labor Relations Board.

Pearson Candy Co., a Division of W. R. Grace & Co. and Bakery & Confectionery Workers International Union of America, Local 400, AFL-CIO. Case 31-CA-1966.

On December 24, 1970, the National Labor Relations Board issued a Decision and Order[1] in the above-entitled proceeding in which the Board, *inter alia*, granted the General Counsel's motion for summary judgment, found that the Respondent has engaged in and is engaging in certain unfair labor practices in violation of Section 8(a)(5) and (1) of the National Labor Relations Act, as amended, and ordered that the Respondent cease and desist therefrom and take certain affirmative action to remedy such unfair labor practices.

Thereafter, on March 5, 1971, the Respondent filed a Motion for Reconsideration of the Board's Decision and Order, alleging that it had discovered new evidence subsequent to the Board's Decision which deals with an action brought by the Secretary of Labor in a federal district court against the Charging Party and which confirms its contentions with respect to actions taken by the Regional Director in the underlying representation proceedings. It also contends that the Board misconstrued the central issue herein in certain respects, and that the Board should, after reconsideration, set aside the Decision and remand the proceeding to the Regional Director for a hearing in Case 31-AC-18 to

[1] 187 NLRB No. 62.

determine if Local 400's certification should be amended. Subsequently, the General Counsel filed opposition to the Respondent's motion.

The Board having duly considered the matter,

IT IS HEREBY ORDERED that the Respondent's Motion for Reconsideration of the Board's Decision and Order be, and it hereby is, denied as the newly discovered evidence does not require or warrant changing the Board's Decision and Order and as it contains nothing not previously considered by the Board.

Dated, Washington, D. C., March 18, 1971.

By direction of the Board:

Robert Volger
Acting Executive Secretary

APPENDIX D.

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) To interefere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further,* That the

bargaining representative has been given opportunity to be present at such adjustment.

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided*, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

(c)(1) Wherever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf

alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 10(c).

* * *

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

* * *

(d) Whenever an order of the Board made pursuant to section 10(c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

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